United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-2097

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA,

Appellee

-against-

MARVIN LITTLE
JAMES SHALLWOOD,

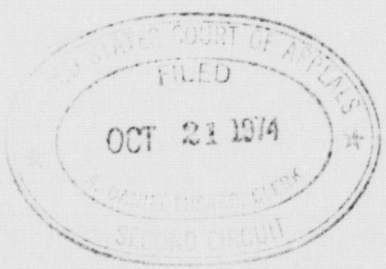
Appellants

- -x

APPENDIX FOR APPELLANTS MARVIN LITTLE

AND JAMES SHALLWOOD

ON APPEAL FROM A JUDGMENT
OF CONVICTION ENTERED IN
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

MARVIN LITTLE and
JAMES SMALLWOOD

Defendants.

- - - - - - - - - - - - - - - - - X

Cr.No. 74CR74
(21,USC §841(a)(1),841 (b)(1)(A), 846 and T.18, USC §2)

1-31-74

TRAVIA, J

THE GRAND JURY CHARGES:

COUNT 1

On or about and between the 17th day of October 1973 and the 30th day of November 1973, both dates being approximate and inclusive, within the Eastern District of New York, the defendant MARVIN LITTLE and the defendant JAMES SMALLWOOD, wilfully, knowingly and unlawfully, did combine, conspire, confederate and agree, together, and with each other, to knowingly and intentionally distribute and possess with intent to distribute a quantity of heroin, a Schedule I narcotic drug controlled substance in violation of Section 841(a)(1), 841(b)(1)(A) of Title 21, United States Code.

In furtherance of the conspiracy and to effect the object thereof, the following overt acts, among others, were committed within the Eastern District of New York. (Title 21, United States Code, Section 846).

O V E R T A C T S

1. On or about October 17, 1973, the defendant MARVIN LITTLE and the defendant JAMES SMALLWOOD, sold a quantity of heroin. amended 4/19/74

2. On or about November 28, 1973, the defendant MARVIN LITTLE had a telephone conversation.

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COUNT 2

On or about the 18th day of October 1973, within the Eastern District of New York, the defendant MARVIN LITTLE and the defendant JAMES SMALLWOOD did knowingly and intentionally possess with intent to distribute approximately 115 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1), Section 841(b)(1)(A) and Title 18, United States Code, Section 2).

COUNT 3

On or about the 18th day of October 1973, within the Eastern District of New York, the defendant MARVIN LITTLE and the defendant JAMES SMALLWOOD did knowingly and intentionally distribute approximately 115 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1), Section 841(b)(1)(A) and Title 18, United States Code, Section 2).

COUNT 4

On or about the 6th day of November 1973, within the Eastern District of New York, the defendant MARVIN LITTLE and the defendant JAMES SMALLWOOD did knowingly and intentionally possess with intent to distribute approximately 98 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) Section 841(b)(1)(A) and Title 18, United States Code, Section 2).

COUNT 5

On or about the 6th day of November 1973, within the Eastern District of New York, the defendant MARVIN LITTLE and the defendant JAMES SMALLWOOD did knowingly and intentionally distribute approximately 98 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1), Section 841(b)(1)(A) and Title 18, United States Code, Section 2).

COUNT 6

On or about the 30th day of November 1973, within the Eastern District of New York, the defendant MARVIN LITTLE and the defendant JAMES SMALLWOOD did knowingly and intentionally possess with intent to distrbute approximately 128 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1), Section 841(b)(1)(A) and Title 18, United States Code, Section 2).

A TRUE BILL

_____
FOREMAN

_____
EDWARD JOHN BOYD V
United States Attorney
Eastern District of New York

APPEAL

CRIMINAL DOCKET

74 CR 74

MISHLER, J. ~~TRAVIA, J.~~

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: AUSA C. CLAYMAN
vs.	CLOSED For deft. Smallwood
MARVIN LITTLE and	Barry Krinsky
JAMES SMALLWOOD	
	For Defendant: Little:
	David McCarthy

Did possess and distribute heroin, etc.

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED					
			DATE	NAME	RECEIVED		DISBURSED	
Fine,			8-9-74	Notice of Appeal (both defts)				
Clerk,				no fee				
Marshal,								
Attorney,								
Commissioner's Court,								
Witnesses,								

DATE	PROCEEDINGS
1-31-74	Before Judd, J - Indictment filed.
2-8-74	Before TRAVIA, J.- Case called- Defts present- Counsel not present- Deft LITTLE waives reading of the indictment and enters a plea of not guilty- 10 days for motion- Deft SMALLWOOD waives reading of indictment and enters a plea of not guilty- 10 days for motion- Bail contd- Both defts- Case adjd to 2-15-74 for all purposes
2-15-74	Before TRAVIA, J.- Case called- Adjd to 3-1-74 to set date for trial
3-1-74	Before TRAVIA J - case called - defts & counsels present - case adjd to March 15, 1974.
3/15/74	Before TRAVIA, J.- Case called- Defts and counsel present-Cas e adjd to 3/29/74 to set trial date

(6th Cir) A-4

74 CR 74

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
3-29-74	Before TRAVIA J - case called & adjd to 4-19-74 to set a date for trial.		
4-19-74	Before TRAVIA J - case called & adjd to 4-26-74 for all purposes.		
4-24-74	Govts Notice of Readiness for trial filed.		
4-26-74	Before Travia J - case called & adjd to May 3, 1974 for all purposes.		
5-3-74	Before TRAVIA J - case called & adjd to May 8, 1974 for trial.		
5-8-74	Before TRAVIA J - case called - referred to Judge Mishler for trial.		
5-13-74	Before MISHLER, CH J - case called - set down for trial before Ch.Judge Mishler on May 16, 1974 at 10:00 am.		
5-14-74	Before MISHLER, CH J - case called - defts & counsels present - (David McCarthy for deft Little and Barry Krinsky for deft Smallwood)		
5-15-74	Before MISHLER, CH J - case called - defts present with attys - Audibility hearing resumed in Chambers - hearing concluded - Hearing on motion to suppress held as to a statement , etc. Motion to suppress statement is denied - hearing concluded - May 20, 1974 possible date for trial.		
5-20-74	Stenographers transcript filed dated May 15, 1974.		
5-20-74	Before MISHLER, CH J - case called - adjd for trial May 22, 1974 @ 10:00		
5-20-74	By MISHLER, J - Memorandum of Decision filed re audibility hearing granted and denied as indicated (see Memorandum)		
5-22-74	Before MISHLER, CH J - case called - defts & counsels present - trial ordered & Begun - Jurors selected and sworn - motion by deft LITTLE to exclude all witnesses is granted - trial contd to May 23, 1974.		
5-23-74	Before MISHLER, CH.J.- Case called- Defts and counsel present- Trial resumed- Trial contd to 5-24-74 at 10:00 A.M.		
5-24-74	By Mishler, Ch J - case called - defts & counsels present - Trial resumed - Trial continued to May 28, 1974.		
5-28-74	Before MISHLER, CH J - case called - defts & counsels present - trial resumed - Govt rests - Motion by deft Little to dismiss the indictment is denied - Motion by deft Smallwood to dismiss the indictment is denied. Trial continued to May 29, 1974 at 11:00 am.		
5-29-74	Before MISHLER, CH.J.- Case called- Defts and counsel present- Trial resum Hearing held on motion to suppress-Hearing concluded- Both sides rest- Motion renewed by defts to dismiss the indictment, etc. is denied-Trial contd to 5-30-74 at 10:00 A.M.		
5-29-74	By MISHLER, CH.J.- Order of sustenance filed		
5-30-74	Before MISHLER, CH J - Case called - defts & counsels present - trial resumed - at 11:30 am the jury retired for deliberation - the court ordered Govt. Ex.#31 sealed - at 2 25 PM the Jury returned and		

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74 CR--74
CRIMINAL DOCKET

DATE	PROCEEDINGS
	rendered a verdict a verdict of guilty as to both defts on all counts 1 to 6 - jury polled and discharged - Memorandum of verdict signed by the foreman ordered filed - motion by the Govt to increase bail is denied - bail conditions continued - all motions reserved until time of sentence - sentence adjd without date - trial concluded.
5-30-74	Stenographers transcript dated May 22, 1974 filed.
5-30-74	By Mishler, Ch J - Order of sustenance filed -lunch-16 persons.
5-31-74	Stenographers Trancript dated 5-23-74, 5-24-74, 5-28-74 and 5-29-74 filed
6-11-74	Voucher for Expert Services filed (LITTLE)
8-9-74	Before MISHLER, CH J - case called - deft LITTLE & counsel D.McCarthy present - Motion to set aside the verdict is denied. Deft is sentenced to imprisonment on counts 1 through 6 for a period of 5 years and special parole term of 5 years on each count - said terms to run concurrently. Clerk to file Notice of Appeal without fee - bail conditions contd - sentence stayed pending appeal. Deft SMALLWOOD present with counsel Barry Krinsky. Deft is sentenced to imprisonment on counts 1 through 6 for a period of one year and one day plus special parole term of 3 years - said terms to run concurrently. Clerk to file Notice of Appeal without fee. Sentence stayed pending appeal - conditions continued. ($5.000)
8-9-74	Judgment and Commitment filed for both defts - certified copies to Marshal.
8-9-74	Notice of Appeal filed for both defts. (no fee)
8-9-74	Docket entries and duplicate of Notice mailed to C of A.
8-20-74	Order received from the Court of Appeals that the Index to be docketed on or before Sept. 13, 1974.(both defendants)

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ AUG 9 1974
TIME A.M.
P.M.

74-2097.

T-3784

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- vs -

MARVIN LITTLE and
JAMES SMALLWOOD

NOTICE OF APPEAL

File No: 74 CR-74

UNITED STATES COURT OF APPEALS
FILED
AUG 12 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Notice is hereby given that the defendants MARVIN LITTLE and JAMES SMALLWOOD hereby appeals in forma pauperis to the United States Court of Appeals for the Second Circuit from the final Judgment entered in this proceeding on the 9th day of August 1974.

Dated: Brooklyn, New York

Aug. 9, 1974

By Direction of the Court

LEWIS ORGEL, CLERK
U.S. District Court
Eastern District of New York
on behalf of the defendant

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

No. 74-CR-74

- against -

Memorandum of Decision

MARVIN LITTLE and
JAMES SMALLWOOD,

Defendants.

May 20, 1974

- - - - - - - - - - - - - - - - - - - -x

The court conducted an audibility hearing of a video-tape /1 and of tapes made from telephone conversations /2 and Kel transmitters /3. Transcripts of the tapes were submitted together with the tapes and marked for identification /4.

The audibility of exhibits 1 and 2 is not seriously challenged. The voice reproduction on these tapes is good. The transcripts (exhibits 1A and 2A) have been approved by defendants' counsel with a few minor variations. United States v. Bryant, 480 F.2d 785, 791 (2 Cir. 1973); United States v. Carson, 464 F.2d 424, 436-437 (2 Cir. 1972).

/1 Government's exhibit 3.

/2 Government's exhibits 1 and 2. The telephone conversations were recorded with the consent of a party to the conversations, i.e. a Government informant, by placing the receiver in close proximity to the recording device.

/3 Government's exhibits 4 and 5.

The sound of the video-tape is likewise audible.[5]

The court finds that the first portion of the video-tape transcript is admissible.[6] Objection is sustained to the portion of the transcript marked "omit" in red crayon.

The tapes marked exhibits 4 and 5 are two recordings of the same conversation. The quality of these recordings ranges from inaudible to fair. The first 20-30 minute segment of the recording is either blank, inaudible, or irrelevant. The portion beginning on page 2 of the transcript (exhibit 4A) and continuing to page 4 is audible and admissible where indicated on the transcript.[7] United States v. Bryant, supra at 789-90; United States v. Weiser, 428 F.2d 932, 937 (2 Cir. 1969), cert. denied, 402 U.S. 949 (1971); United States v. Kaufer, 387 F.2d 17, 19 (2 Cir. 1967). Similarly, the portion of exhibit 5A beginning on page 8 and continuing to page 10 is admissible where indicated.

/4 The transcripts were marked as Government's exhibits 1A, 2A, 3A, 4A and 5A. The exhibit numbers of the transcripts correspond to the exhibit numbers assigned to the respective tapes.

/5 The court did not view the picture.

/6 Exhibit 3A.

/7 The inadmissible portions are marked 'omit.'

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Defendants decline to stipulate to the accuracy of the remainder of exhibits 4A and 5A. These transcripts may not be placed before the jury. United States v. Bryant, supra, at p. 791.

Jack B. Weinstein

U. S. D. J.

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THE COURT: Well, the only thing I'm thinking of -- it has nothing to do with the case -- but I recall the first time I had a criminal matter it was in the Magistrate's Court over in Queens and Court started at 9:30 and I got there about ten to nine. And ever since whenever I had a court date I was always there about a half hour before. But I notice here lawyers won't give up a minute. If they are supposed to be here at ten o'clock it's ten o'clock and not one minutes after. And if they have parking problems, or anything else, the court just waits. Let the Court waiting. Strange.

At any rate, Mr. Little has finally arrived, for which I'm grateful.

MR. MC CARTHY: Thank you, Judge.

I notice that I was here at nine-thirty today.

THE COURT: You were. Mr. Krinsky wasn't. Mr. Little just came in.

Seat the jury.

(Jury entered the Courtroom.)

THE COURT: Good morning, ladies and gentlemen.

I trust you have all found on your seats a document described as memorandum of verdict.

I call it that because I don't know what else to call it. It certainly isn't a verdict because the verdict is given in open court first by the foreman and then I poll the jury and if all the jurors agree with it it then becomes the verdict of the case.

And the description of the counts is just a brief description to remind the jurors of what the indictment charges, and not intended to be in any way a part of the charge, but to keep you on the ball so that you can recall when you deliberate on the matter what each count charges, and to make certain that you understand that in United States of America against Marvin Little and James Smallwood that you are to judge the guilt or innocence of each defendant as to each count, not to lump them together because they are co-defendants.

The only exception to that, as you will learn later, is that as to count 1 you will find both defendants guilty or both defendants not guilty because the Government's theory on the conspiracy is that these two defendants were in the narcotics business for the period. And you can't have a conspiracy with one.

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If the Government doesn't prove that both were members the count must fail.

But with that modification -- and it really isn't a modification, just a difference in concept of the charge -- you must understand that each defendant is to be separated in each count to be considered against each defendant.

You in effect have twelve trials, six charges against each defendant. And I use this as a convenient method to put before the jury the type of charge, so that the jurors might recall what I said with reference to the specific charge.

When you get into the jury room, you can destroy the document, mutiliate it, use it for a memorandum, tear it up at the end, but in the meantime I think it will serve a useful purpose. I would only ask the foreman when you have arrived at a verdict to sign the form, and for that purpose I will give you another form that you can doodle on or destroy.

The lawyers have ably performed their task in this case. This is an adversary proceeding and they contested over the issues. The Government took one side of the issue, the defendants the other side of the issue. And the concept of an adversary

proceeding is that when lawyers of comparable ability fight over an issue, one takes one side and one the other, they will develop the testimony for the jury to see.

The lawyers are partial, they are wound up in their clients' cause and their zeal is an effective force in producing all the evidence available on the particular issue. And they have already completed their job.

During the trial I have made rulings and I have only partially completed my task. When I get through charging and Iaccept the verdict, that will be my complete function. I in a jury trial am the sole judge of the law. You must accept the law as I charge it.

I will shortly read part of the pertinent sections of the Drug Abuse & Control Act of 1970, which is the popular name for the act that Congress enacted which became effective on May 1, 1971. And you may not like parts of the statute that I read to you, and you may think you could have done a better job but as jurors you must accept the law both as I charge it from the statute. If you question it, if you decide not to use it, not to apply it, you're violating your oath,

because now you'd be trespassing on the area that was specifically carved out for the Court.

And in the same spirit and for the same reason, I cannot infringe on your authority. Just as the Court is the sole judge of the law, so the jury is the sole judge of the facts. You and you alone decide what happened during the period beginning on or about October 17th, 1973 to on or about the 30th day of November 1973. And applying the law to the facts as you find them, then you will find each defendant guilty or not guilty as to each charge in the indictment.

So if you clearly understand the duty and the power that you have and the duty and power that you don't have, and recognizing the function of the lawyers in this trial, it will make for a fair trial.

And after all, that's what we're all trying for, you to seek the truth out to determine what happened, and I making an earnest effort to give you the law as I understand it.

We start, as has been stated and restated, with the presumption of innocence. The defendants -- the defendants, and I may use it in singular or

plural, but unless I specifically refer to a specific defendant, I mean it to apply to both defendants -- both defendants are presumed to be innocent of all the charges in the indictment. They pleaded not guilty to it. That means that you must conclude at the outset that the defendants are innocent of the charges, and that presumption prevails throughout the trial, throughout your deliberations and is enough to acquit the defendants unless the Government has proved the guilt of the defendants or defendant, as to any charge by proof beyond a reasonable doubt.

In other words, the presumption of innocence alone is enough to acquit the defendants.

I like to refer to what is known as the Scotch verdict. In Scotland they have three verdicts: Guilty, not guilty and not proven. Here we only have two verdicts, guilty or not guilty. But the not guilty verdict includes the Scotch verdict of not proven.

Now, what is proof beyond a reasonable doubt? It's a doubt which a reasonable person would have after weighing all the evidence. A reasonable doubt is a doubt based on reason and common sense and experience viewed in light of the record, the

the testimony in the case, as distinguished from some vague, speculative or imaginary doubt.

We understand that it isn't a pleasant task to find any defendant guilty but it's not the kind of doubt that's based on the emotion that arises from performing an unpleasant task. A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act in a matter of importance to himself or herself. Proof beyond a reasonable doubt therefore is proof of such a convincing nature that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

The Government's burden is not to prove that every bit of evidence, every bit of testimony or every document introduced into evidence is true beyond a reasonable doubt. It is not to prove the guilt of the defendant beyond all possible doubt. The burden of the Government is a heavy one, but it has its limits. It's to prove every essential element of the crime as charged beyond a reasonable doubt. And I will explain what the essential elements of each crime charged are. Actually, it's the component parts of the crime that we break up for easy and intelligent viewing so you

can better understand the Government's burden.

Reasonable doubt may arise from the state of the record -- and when you talk about the record I mean the testimony and the exhibits marked in evidence and the stipulated facts -- or it may arise from the lack of evidence. You must keep in mind always that the defendants need not prove their innocence. They may rely on the failure of the Government to prove their guilt.

Evidence is the method that the law uses to prove or disprove a disputed fact. And after all, that's what you're sitting in this trial for, to make determinations, decisions, judgments on disputed facts.

It's generally classified in two classes: One is direct evidence, the other circumstantial or indirect evidence. And you have heard the term circumstantial before you came to Court, I'm sure. It's a common term.

There is no mystery to circumstantial evidence. Direct evidence is easily defined as testimony of what a witness saw or heard as to that disputed fact. And circumstantial evidence is defined as a method of proving or disproving a disputed fact by drawing reasonable inferences

based on common sense and experience.

Now, those are the definitions, and I find they don't have any real meaning to laymen unless an example is given, and I like to use this example and I have given it. I think it demonstrated what I'm talking about.

If you were sitting as a jury in a personal injury case and the disputed fact was whether the defendant who was charged with, let's say negligence, failure to operate his car with due care, ~~car,~~ passed a stop sign without stopping, -- I will give you a set of facts that set the stage for the example:

LEt's assume that my courtroom deputy, Mr. Adler, and myself, were standing on a street corner on which was placed a stop sign. Let's assume he had his back to the stop sign and his back to to the roadway, and I was facing the stop sign, it was in full view. Let's assume Mr. Jones was operating his motor vehicle, a 1974 Cadillac, down X Street at 65 miles an hour, passed the stop sign and struck Mrs. Smith, who was crossing the intersection. So Mrs. Smith now sues Mr. Jones for the injuries that she suffered.

Mr. Jones, in his pleading, says "I did

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stop at the stop sign and then proceeded. I did not violate the Vehicle and Traffic Law, which requires that I stop at a stop sign before proceeding."

Mrs. Smith says, "Oh, yes, you did. You came down the avenue at 65 miles an hour and struck me as I was crossing."

If I were called to testify in that case I would testify substantially as I just indicated: I was talking with my courtroom deputy, I have the stop sign in view, I see Mr. Jones operating the 1974 Cadillac at 65 miles an hour, he didn't slow down, operated at the same pace, he crossed the intersection and struck Mrs. Smith."

Now, there is direct testimony as to that dispuated fact. Well, Mr. Alder is qualified to testify as a witness on that issue, but he can't give direct testimony because he had his back to the stop sign. But he might testify as to circumstances from which a jury might reasonably draw the inference, based on good common sense and experience, that indeed Mr. Jones passed the stop sign without stopping. He might say that while he was talking with me there came within his peripheral vision Mr. Jones' car travelling at what he believedwas 65 miles an hour, and of

course he had his back to the roadway and to the sign, he lost sight of it for, let's say about a hundred feet, and three second later he noticed it again and saw it strike Mrs. Smith. Now what are the circumstances: That that car traversed a distance of 100 feet over a period of about three or four seconds, and I think you will agree with me that the reasonable inference under those established circumstances is that Mr. Jones passed the stop sign without stopping.

So there you have proof on the same disputed issue both by direct and circumstantial. The law does not hold that one type of proof is of better quality than the other. At times the direct evidence is of better quality and at times the circumstantial evidence is of better quality. The law requires the Government to prove the guilt of the defendants on both the direct and circumstantial evidence by proof beyond a reasonable doubt.

I think it's appropriate to define inference and presumption so that you may understand the difference. I use both terms.

An inference is a conclusion which the Jury may draw, based on reason and common sense.

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A presumption, on the other hand, is a conclusion which the law requires the jury to make and prevails unless overcome by proof to the contrary beyond a reasonable doubt. And the example of that, of course, is the presumption of innocence..

I indicated that the basis of your determination of this case is the record. The record in this case -- and that means the testimony of all the witnesses regardless of who called them, all the exhibits marked in evidence and only those marked in evidence -- at times documents were marked for identification -- if they're not marked in evidence, then you may not see them -- the stipulations of counsel, and if I judicially noticed any facts then those facts -- for example, I might have said that a certain day of the week or a certain day of the month came on a certain day of the week. That's a fact that's established and I might judicially notice. I don't recall whether I did or not but that's unimportant. If I did then it's part of the record.

And I think it's helpful to understand what is not part of the record. At times I sustained objection to questions and where the answer was made

and stricken I said, "Strike it from the record and the jury disregard it."

That means just as it's physically stricken from the record, so you must figuratively strike it from your mind, from your consideration as if you have never heard it.

(Continued on the next page.)

You may have heard some random remarks of counsel. Of course, it's not in the record. You must disregard it.

If I made any statement concerning any fact itself not in the record, you must disregard it. At times, a lawyer incorporates into a question a statement of fact that was not based on anything in the record and if the witness did not adopt the fact, denied it, you may not assume that that fact is so or give it any credence because it was not in the record.

You may not speculate on what an answer to a question for which objection might have been.

For example: If a lawyer asked a question and another lawyer objected and I said, "Objection sustained," you can't speculate on what that answer to that question might have been.

Again, objection was sustained and you may not consider it.

You must so discipline your thinking so that you will be able to reject matters that are not in the record. Of course, that doesn't mean that you shouldn't use your good common sense and experience in making fair and reasonable inferences from the facts established

by the record. That in fact is your function.

You, the jurors, are the sole judges of the credibility of the witnesses, which means the believability of their testimony and the weight their testimony deserves. Scrutinize the testimony given and the circumstances under which each witness testified and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence and his schooling. Consider the motive of each witness and his state of mind as he or she testified before you. Take into consideration the demeanor of the witness, which means behavior of the witness on the stand and the manner in which the witness answered questions.

Ask yourself, "Was the witness evasive? Did the witness answer the questions on matters of which he had knowledge or should have had knowledge?"

Take into consideration the witness' own ability to observe matters as to which he or she has testified; whether he or she shall have impressed you as having an accurate recollection on those matters.

Take into consideration the relation that the witness bears to the case and bears to the litigants in the case, the United States of America; bears to

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the defendant, Marvin Little and bears to the defendant, James Smallwood. Take into consideration the extent to which the witness was either corroborated or contradicted.

These are general rules and guides that I call to your attention so that you may be alerted to the nature of your responsibility in assessing credibility, but each of you throughout your lives have assessed credibility. Your respective spouses, you might have questioned what your husband or wife did, your children, your friends, your business associates. You just didn't do it pursuant to form of rules, but you may think of other reliable guides to the truth. Use them. Don't feel strait-jacketed by what I have just given you.

You may think one particular suggestion is of greater importance than the other. That's for you to use and for you to consider.

Evidence at some time prior to the witness testifying, said something or did something which is inconsistent with the witness' testimony at the trial may be considered by the jury for the purpose of judging the credibility of the witness. You may even consider the failure of a witness to disclose on

on the prior occasion testimony which he disclosed at the trial. In other words, if under the particular circumstances where a witness gave a statement or was interviewed, the witness failed to give information that you'd reasonably expect someone to have given under all those circumstances, you may consider that as a prior inconsistent statement.

Whether a prior statement was made is a question of fact for you, solely for you. Whether it's inconsistent with the testimony is solely a question for you and how that prior inconsistent statement affects the witness' testimony is a matter solely for your determination. You look at the prior inconsistent statement. You see whether it's really as to a material or immaterial fact.

Take into consideration all the circumstances under which the witness gave the prior inconsistent statement if you find it inconsistent. In the light of all that, measure the weight, the credibility of the witness' testimony.

If you find that a witness knowingly testified falsely under oath as to a material fact, you may disregard all that witness' testimony on the theory that the witness is unworthy of belief. On the other

hand, you have a right to accept that portion of the testimony that you recognize as being believable. Again, that principle underscores the wide discretion the jury has in seeking out the truth, in seeking out what happened here.

Mr. McCrea, called as a witness by the Government and Mrs. Dove, called as a witness by the defendant were convicted of felonies. Mrs. Dove, of one felony; Mr. McCrea, of two felonies, as I recall.

A witness is not disqualified because he was convicted of a felony. He's competent -- he or she is competent to testify. It's merely a circumstance which the jury may consider in determining the credibility of the witness. Again, it's the province of the jury alone to determine what effect it has.

Mrs. Dove testified that she knows the reputation of Mr. McCrea for truth-telling. Well, you heard her testimony. You heard the basis of her opinion. Take into consideration her relationship with Mr. McCrea and her relationship with the defendants and all the other guides that I gave you and some that you may think of that I didn't give you in determining the weight that her testimony has in impeaching or discrediting the testimony of Mr. McCrea.

17-25

The witness may be impeached or discredited by evidence that the general reputation of the witness for truth and veracity is bad in the community where the witness now resides or has recently resided. If you believe that Mr. McCrea's testimony has been impeached or discredited, it is your exclusive province to give his testimony such credibility, if any, as you think it deserves.

Again, the Government presented Mr. McCrea as a paid informer. Now, Mr. McCrea is not incompetent to testify because he's a paid informer, but his testimony must be examined and weighed by the jury with great care. The jury must determine whether the informant's testimony has been affected by his interest as an informer.

Not only is informer's testimony and not only is he competent to testify, but if after weighing it with great care, examining it cautiously, you are convinced beyond a reasonable doubt that it is true, then you may base a conviction on that testimony alone even though it's not corroborated; however, you may not convict a defendant on an informer's testimony alone on the uncorroborated testimony of an informer unless you believe it to be true beyond a reasonable

doubt. I make no evaluation as to whether or not any of Mr. McCrea's testimony is corroborated. That is solely a matter for you.

The Government offered the testimony to Special Agent Carr that upon his arrest, the defendant James Smallwood said substantially, "I don't know the guy. I was just getting a ride across town." I may not quote it correctly. You use your recollection of what was said. If you wish, I'll read it from the transcript.

Statements of a defendant -- this applies only to the defendant Smallwood -- because the testimony of Special Agent Carr was that Mr. Smallwood said it. I don't say it's so. You weigh the testimony and if you believe that's what was said, you may consider it as an exculpatory statement. If you find it's false, then you may draw the inference that I will describe to you.

(Continued on next page.)

7-30

SS:pc
take 2/2am

Charge

THE COURT: (continuing)

A statement by a defendant -- in this case, Mr. Smallwood -- knowingly made upon being informed that a crime has been committed or upon being confronted with a criminal charge may be considered by the jury in the light of all other evidence in the case in determining guilt or innocence.

When a defendant voluntarily and intentionally offers an explanation or makes some statement intending to show his innocence and this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to the consciousness of guilt.

The law recognizes that ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement intending to establish his innocence.

Whether or not evidence of a defendant's voluntary explanation or statement points to a consciousness of guilt and a significance to be attached to any such evidence, are matters exclusively within the province of the jury.

If you find the statement was made, again,

you determine whether the statement was knowingly made; that the defendant Smallwood was aware of what he was saying and that it wasn't because of some slip of the tongue or inadvertence or other innocent mistake.

The defendants in this case did not take the witness stand. The law does not compel a defendant in a criminal case to take the witness stand and testify. No presumption of guilt may be raised and no unfavorable inference of any kind may be drawn, in the failure of a defendant to testify.

A defendant, as previously charged, may rely upon the failure of the Government to prove its case. It would be improper for you to discuss the failure of the defendant to take the witness stand and testify.

Now we turn to the charge in the indictment. Again, the caption is "United States of America against Marvin Little and James Smallwood." Marvin Little and James Smallwood are the defendants in this case. No one else. You will determine whether the Government has proved its case beyond a reasonable doubt as to each charge and against each defendant.

The indictment is based on a statute enacted

by the Congress. What is a crime is determined, at least a Federal crime, is determined by the Congress of the United States.

As I said, in 1970, the Congress enacted a comprehensive statute which, through statement and design, was intended to very strictly control the manufacture, importation, distribution, possession and the use of certain drugs.

It established certain schedules and made it a crime for anyone to possess with intent to distribute and to distribute those drugs.

I'll read the pertinent portion of the statute.

First, under Section 812(a) it says, in part, there are established 5 schedules of controlled substances to be known as Schedules 1, 2, 3, 4 and 5.

And, defining the drugs listed under Schedule 1, it says, "The drug or other substance has a high potential for abuse." That's the subdivision.

"The drug or other substance has no currently accepted medical use in treatment in the United States."

(c) "There is a lack of accepted safety for use of the drug or other substance under medical

4] supervision."

Under Schedule 1(b) and subdivision 10, it lists heroin with this introductory paragraph. I'll read that in part.

"...any of the following opiates," derivatives, their salts, isomers and salts of isomers, "... whenever the existence of such salts, isomers," and salts of isomers "...is possible within the specific chemical designation:" Heroin is listed. Those are the section that established heroin as a Schedule 1 drug.

Then, under Section 841(a)(1), referred to in the indictment, which I'll shortly read, and referred to in the memorandum of verdict, it said this in part:

"...it shall be unlawful for any person knowingly or intentionally -- (1) to distribute or possess with intent to distribute," a schedule 1 drug. That's the statutory basis for the charges.

Under 846, we find the statutory basis for Count 1. That says:

"Any person who conspires to commit any offense defined in this subchapter, violates the section."

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Charge

So, as briefly as that, we have the conspiracy statute upon which Count 1 is based.

Count 1 is different in concept, in theory and idea than counts 2 to 6 inclusive. Count 1 proscribes, prohibits the entering into any understanding, the going into a business to possess with intent to distribute and to distribute heroin.

The other counts charge the possession and distribution of the drug.

I'll first read count 1. It's a lengthy count, so when you read count 1 in the memorandum of verdict, you'll think of what I read to you rather than limit yourself to what you read. Then I'll read counts 2 to 6 and I'll charge you on how the establishment of the conspiracy count may result in your determination of the substantive counts.

I don't want to get too far ahead, because if I go slowly enough and you listen, I think you'll understand the difference between theory and the consequences of establishing the conspiracy count.

Count 1 charges the following:

"On or about and between the 17th day of October, 1973 and the 30th day of November, 1973, both dates being approximate and inclusive, within the

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Charge

Eastern District of New York, the defendant Marvin Little and the defendant James Smallwood, wilfully, knowingly and unlawfully, did combine, conspire, confederate and agree, together, and with each other, to knowingly and intentionally distribute and possess with intent to distribute a quantity of heroin, a Schedule 1 narcotic drug controlled substance in violation of Section 841(a)(1), 841(b)(1)(A) of Title 21, United States Code.

In furtherance of the conspiracy and to effect the object thereof, the following overt acts, among others, were committed within the Eastern District of New York. (Title 21, United States Code, Section 846).

Overt Acts.

1. On or about October 17, 1973, the defendant Marvin Little and the defendant James Smallwood, sold a quantity of heroin .

2. On or about November 28, 1973, the defendant Marvin Little had a telephone conversation."

That is a conspiracy count. Conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose. It is a kind of partnership in crime in which each member

becomes the agent of the other member.

The gist of the offense is an understanding, an agreement to disobey the law. Mere similarity of conduct between Mr. Little and Mr. Smallwood and the fact that they may have associated with each other and discussed common names and interests, does not necessarily establish proof of the existence of a conspiracy.

The presence of one in the other's company, if you believe one committed the crime, the presence of the other alone does not establish a conspiracy; however, the evidence in the case need not show that the parties got together and entered any formal agreement; that they directly, either in writing or by words expressly came to an understanding as you might think of in a legitimate business.

What the evidence in the case must show beyond a reasonable doubt in order to establish proof that a conspiracy existed, is that Mr. Little and Mr. Smallwood, in some manner, positively or tacitly came to a mutual understanding to go into the narcotics business.

Before you may find that either defendant knowingly and wilfully entered into the conspiracy,

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you must find proof in the record through the testimony of the witnesses, as to what the particular defendant did and said that would bring you to the determination that the Government proved beyond a reasonable doubt that they were aware of what they were doing, and they did it intentionally, not inadvertently; that they knew they were going into the narcotics business.

In order to determine whether the defendants are guilty of the crime charged in count 1, the conspiracy count, the Government must prove beyond a reasonable doubt the following essential elements:

1. That the conspiracy described in the indictment was wilfully formed and existing at or about the time alleged.

In other words, the Government must prove beyond a reasonable doubt that Marvin Little and James Smallwood knowingly and wilfully entered into this understanding to possess with intent to distribute and to distribute heroin at or about and between October 17th, 1973 and November 30, 1973;

2. That both knowingly and wilfully entered into the conspiracy, being aware of the unlawful purpose, and both intending the acts that brought

both defendants into the conspiracy knowing that it was a violation of law to deal in heroin;

3. That either Marvin Little or James Smallwood thereafter knowingly committed one of the two overt acts charged in the indictment at or about the time and the place alleged and;

4. That the overt acts were knowingly performed and in pursuance of the objectives of the conspiracy.

In other words, that they were aware that what they were doing was to further the heroin business. They were doing it for their business.

The Government, as I say, must prove all the essential elements of the crime charged by proof beyond a reasonable doubt.

(continued next page.)

ahb 1 1 Charge

Now, Count Two charges possession of a certain quantity of heroin on a certain day with intent to distribute. Count Four charges possession of a certain amount of heroin with intent to distribute, possession being knowing -- and I'll explain that. I've done it already, but I'll do it again.

And Count Six charges possession with intent to distribute on a certain date a certain quantity of heroin.

Count Three and Count Five charge the distribution of the same heroin that's respectively in Count Two and Count Four. In other words, they were not on separate days and it wasn't different heroin. The indictment charges that in the one case the defendants possessed the heroin with intent to distribute, and then distributed it, sold it, delivered it, gave it away.

In Count Six the indictment charges that there was no distribution or delivery, or they don't charge it, at any rate, and the indictment charges only the possession with intent to distribute on November 30, 1973.

The essential elements of the crime charged in Count Two are, one, that the defendants possessed

approximately 115 grams of heroin on October 18, 1973; two, that the possession was knowing and intentional and with intent to distribute.

Now, possession is of two kinds, it's either actual or constructive. If I personally held these glasses in my hand I'd have actual possession of the glasses. I have direct control and domination over them. I can give them away, destroy them or use them.

If these glasses were in my chambers or at the opticians' being repaired, I'd have constructive control; though not in direct control, I still have domination and control over it. I could ask my courtroom deputy to get them for me.

The law makes no distinction between the two types of control. It requires that the Government prove either actual or constructive possession by proof beyond a reasonable doubt. Control can be single or joint. More than one person can have control of something.

If you and I were in some venture and I held some money, and you had the right to part of it, I might be in full control of the hundred dollars, and in actual possession, and you might be in constructive possession. I might be holding for both, or it might

be joint.

So the Government may prove that possession by one was the joint possession of both. The Government must prove that by proof beyond a reasonable doubt.

Now, the second element is what we call criminal intent, that possession was knowing and intentional and with intent to distribute. In other words, the Government must prove beyond a reasonable doubt that the defendants knew that what they had was heroin and possessed it intentionally, not inadvertantly, not innocently, not unaware. They knew that what they had was heroin.

For example if someone gave you a jar of talcum powder and you had it on you traveling, and you were stopped, and it was examined and it turned out to be heroin, that wouldn't be a crime. It lacked criminal intent. So the Government must prove that the defendants knew that it was heroin. And intentionally, not innocently, voluntarily and with intent to distribute. The Government must prove beyond a reasonable doubt that this was not intended for the possessor's personal use, that it was intended for sale or other distribution.

So the Government must prove beyond a reasonable

doubt that the defendants on October 18, 1973 possessed approximately 115 grams of heroin, and two, that the possession was knowing and intentional and with intent to distribute. They must prove both.

When we turn to Count Three, that charges that in the same transaction another crime was committed, and that is the distribution of the same heroin. I will read Count Two, and then I will read Count Three. I don't think I read the counts.

Count Two: On or about the 18th day of October 1973 within the Eastern District of New York the defendant Marvin Little and the defendant James Smallwood did knowingly and intentionally possess with intent to distribute approximately 115 grams of heroin, a Schedule I narcotic drug-controlled substance, Title 21, United States Code, Section 841(a)(1), Section 841(b)(1)(a), and Title 18, United States Code, Section 2.

Count Three: On or about the 18th day of October 1973 within the Eastern District of New York the defendant Marvin Little and the defendant James Smallwood did knowingly and intentionally distribute approximately 115 grams of heroin, a Schedule 1 narcotic drug-controlled substance, Title 21, United States

Code, Section 841(a)(1), Section 841(b)(1)(a).

Under Count Three the Government must prove beyond a reasonable doubt that on October 18, 1973 the defendants distributed, sold, gave away approximately 115 grams of heroin; two, that such distribution was knowing and intentional. And I won't restate the definition, I've just given it to you.

Again, Count Four is a possession count that involves a transaction that Mr. McCrea testified was conducted on November 6, 1973, and just as in Count Two, the Government must prove beyond a reasonable doubt that on or about November 6, 1973 defendant possessed approximately 96 grams of heroin, and two, that such possession was knowing and intentional and with intent to distribute.

Count Five is similar in its essential elements to Count Three. And I just read Count Three to you, and that's -- I'm sorry, this is Count Four. I didn't read Count Four to you. I'll read Count Four and Count Five, because they involve the same transaction.

Count Four: On or about the 6th day of November 1973, within the Eastern District of New York the defendant Marvin Little and the defendant James Smallwood did knowingly and intentionally possess with

intent to distribute approximately 98 grams of heroin, a Schedule I narcotic drug-controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), 841(b)(1)(a).

Count Five: On or about the sixth day of November 1973 within the Eastern District of New York the defendant Marvin Little and the defendant James Smallwood knowingly and intentionally distribute approximately 98 grams of heroin, a Schedule I narcotic drug-controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

So again I say as in Count Two the Government must prove beyond a reasonable doubt, one, that on or about November 6, 1973 defendant possessed -- defendants; when I say defendants, don't lump them together, measure each defendant against the record, see if the Government proved its case beyond a reasonable doubt -- the defendants possessed approximately 96 grams of heroin; two, that such possession was knowing and intentional and with intent to distribute.

And under Count Five, the distribution count, the Government must prove beyond a reasonable doubt that on November 6, 1973 the defendants distributed approximately 98 grams of heroin, that such

distribution was knowing and intentional.

We come to Count Six. It refers to the transaction that Mr. McCrea testified to, and again I don't say it's true and I don't say it isn't true. That is solely for your determination.

It charges as follows: On or about the 30th day of November 1973 within the Eastern District of New York the defendant Marvin Little and the defendant James Smallwood did knowingly and intentionally possess with intent to distribute approximately 128 grams of heroin, a Schedule I narcotic drug-controlled substance, in violation of Title 21, United States Code. And this possession count is similar in its essential elements to Counts Two and Four. The Government must prove beyond a reasonable doubt that the defendants possessed approximately 128 grams of heroin, two, that such possession was knowing and intentional and with intent to distribute.

Now, just as in theory once the conspiracy charged is established, the Government must prove all the elements of the conspiracy by proof beyond a reasonable doubt. And the acts of one conspirator, partner, bind the other conspirator, partner, as to all those acts committed within the term of the partnership and

in furtherance of the partnership. So one partner is responsible for all the criminal acts of the other if those criminal acts were committed during the term of the partnership and in furtherance of the purposes of the partnership. And I have equated partnership with conspiracy.

(Continued on next page.)

M-2

Charge of the Court

Now, you take count six as an example. There is no proof in the record that the defendants Marvin Little possessed the heroin which John McCrea says he delivered to the defendant James Smallwood. However, the law imposes criminal liability on the defendant Marvin Little if the Government proves beyond a reasonable doubt all the elements that comprise the conspiracy count in count one, and further proves beyond a reasonable doubt that the defendant James Smallwood committed the offense in count six and further beyond a reasonable doubt that the substantive offense charged in count six was committed during the term of the conspiracy and in furtherance of the objectives of the conspiracy.

Now, I have given you all the essential elements of the crimes charged, and, of course, in every case, the Government must prove beyond a reasonable doubt that it was the defendant charged, these defendants, that committed the offenses charged.

You will shortly be asked to require from the courtroom to deliberate on the matter before you. When you do you should be reminded that each juror has the obligation of going over the

testimony, going over the record, the exhibits, forms and letters FOR HIMSELF AND HERSELF. You have the further obligation of discussing your opinions, your conclusions, the evidence with your fellow jurors. This isn't a decision to be made in isolation. These are twelve independent determinations arrived at through the deliberative process, which means conferring with your fellow jurors.

It's improper for any juror to take an intransient INTRANSIGENT position and refuse to discuss the matter with fellow jurors. It's equally improper for any juror to abandon his obligation and just go along with the rest of the jurors.

During your deliberations you may want to have some testimony reread, you may want to see the exhibits. If you want to hear any of the recordings that will be done in open Court but every other exhibit will be sent in at your request. If you don't request any, I won't send them in. If you request one identify it, I will send it in. If you request all I will send all in.

In asking for testimony to be read please try to identify the testimony by subject matter and if possible by witness. It makes it easier

to understand what you want to hear.

Now send all your notes through the foreman. The foreman is directed to send any note that any juror wants me to receive -- in other words, you're not a censor, you're merely a conduit. Don't ask me questions. I find that becoming a frequent practice and I want to make it clear it would be improper for me to answer questions because I would in effect be usurping your power. That would be wrong.

I will answer questions on testimony by reading back the testimony. I will answer questions on exhibits by sending in the exhibits.

During your deliberations don't tell me how you stand at any time during your deliberations on your voting. Don't tell me that you stand six to six, eight to four, ten to two or eleven to one. I am not interested. As a matter of fact, you'd be telling me something I shouldn't know.

Jury deliberations are private and secret. They are not to be revealed. And when you have arrived at a verdict, without telling me what the verdict is, just say, "We have arrived at a verdict." I will know that that's a unanimous verdict.

A-56

When I hear that I will call you into the courtroom, say Mr. Foreman I have your note saying that you have arrived at a verdict. In the case of United States again Marvin Little and James Smallwood as to count 1, how do you find the defendant Marvin Little? You will say guilty or not guilty. How do you find defendant James Smallwood? You will tell me guilty or not guilty. And so I will go down with each count. Just a reminder, again, that a conspiracy consists of two or more. In this conspiracy the Government charges two as being the conspiracy, so it would be a verdict that couldn't be sustained if you found one guilty and one not guilty.

As to count 1 you find both guilty or both not guilty. As to the other counts, of course, you judge each one by the record, see whether the Government proved its case beyond a reasonable doubt.

I am going to ask you to leave the Courtroom for just a few moments while I talk to the lawyers, and at this point I don't want any discussion on the case. You're not at liberty to talk about it yet, but it will be soon. The jury

is excused.

(Jury left the Courtroom.)

THE COURT: First, Mr. Schall, are there any exceptions or requests?

MR. SCHALL: Your Honor, just purely I think a couple of factual things. I believe that you stated when you were referring to the exculpatory statement alleged to have been made by Mr. Smallwood at the time of his arrest, that that was introduced through Agent Carr. I believe it was Agent Lentini.

THE COURT: My recollection -- do you agree?

MR. KRINSKY: That's correct, your Honor.

THE COURT: All right.

MR. SCHALL: The only other one which I had, your Honor, I think towards the end of your charge you stated that Mr. McCrea stated -- testified -- your statement was to the effect that he had delivered heroin to Mr. Smallwood.

THE COURT: Oh, the other way around?

MR. SCHALL: It should be the other way around I submit. But those were the only two things I had.

THE COURT: All right, Mr. McCarthy?